Supreme Court, U.S.
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No. 04-1188

IN THE

Supreme Court of the United States

JERRY WAYNE WREN,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

PETITION FOR A WRIT OF CERTIORARI

J. STEPHEN SALTER
100 Age Herald Bldg.
2017 Fifth Ave. North
Birmingham, AL 35203
(205) 252-9751

SAM HELDMAN *
GARDNER MIDDLEBROOKS
2805 31st St. NW
Washington, DC 20008
(202) 965-8884

* Counsel of Record

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20001

QUESTIONS PRESENTED

1. Whether the judgment should be vacated and the case remanded for resentencing, on the grounds that sentencing Petitioner pursuant to a mandatory Guidelines scheme constituted plain error in light of *U.S. v. Booker*, where (a) this case arises on direct review; and (b) at sentencing, the trial court emphasized that it was imposing the lowest sentence that the relevant Guidelines range allowed, and that it had no discretion to vary from the Guidelines range.

2. Whether the judgment below should be vacated because the panel of the Court of Appeals included a member, Hon. William Pryor, who has not been confirmed by the Senate.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Jerry Wayne Wren respectfully prays that a writ of certiorari issue to review the decision of the U.S. Court of Appeals for the Eleventh Circuit in *U.S. v. Wren*, No. 03-13876-A.

OPINION BELOW

The opinion of the Court of Appeals, 1a-6a, is unpublished.

JURISDICTION

This Court has jurisdiction under 28 U.S.C. § 1254(1). The decision below was issued on December 16, 2004.

STATEMENT OF THE CASE

Wren was convicted in the U.S. District Court for the Northern District of Alabama of attempting to possess marijuana with intent to distribute, under 21 U.S.C. §§ 846 and 841(b)(1)(B). The offense level, combined with a criminal history category I, resulted in a Guidelines range of 63 to 78 months. The Judge sentenced at the bottom of that range, stating among other things that the 63-month term was "the lowest I can give you. . . . Under the guidelines, I have no discretion as far as above or below under the facts of this particular case." (8a).

Wren appealed his conviction to the U.S. Court of Appeals for the Eleventh Circuit, which affirmed without oral argument on December 16, 2004. The panel included Hon. William Pryor, who has not been confirmed by the Senate. The appeal did not concern sentencing issues. This Court's opinion in *U.S. v. Booker*, ___ U.S. ___, 125 S.Ct. 738 (2005), did not issue until the time for seeking rehearing had run.

REASONS FOR GRANTING THE PETITION

1. Wren was sentenced during the pre-*Booker* era when the Guidelines were held to be mandatory. *See U.S. v. Booker*, ___ U.S. ___, 125 S.Ct. 738 (2005). This case is on direct review. Though the decision of the Court of Appeals came before this Court's decision in *Booker*, this timely petition for certiorari arrives after *Booker*, and so the *Booker* holding is applicable to this case.

The treatment of the Guidelines as mandatory was error, and the error was plain; it is now perfectly settled that the Guidelines are not mandatory. There was plain error in this regard, even though there was no enhancement based on a non-jury finding of fact. The remedial scheme of *Booker* applies not only to defendants who suffered a particular Sixth Amendment violation, but also to those who were "sentenced

under the mandatory regime without suffering a constitutional violation." *U.S. v. Hughes*, 396 F.3d 374, ___, 2005 U.S. App. LEXIS 1189, *11-12 (4th Cir. 2005).

Moreover, there is good reason to believe that the District Judge would have imposed a lesser sentence had she understood that she had the power to do so. In sentencing Wren at the bottom of the Guidelines range, the Judge emphasized that this was "the lowest I can give you" and that she had "no discretion" to go below that. (8a). While the Judge found that this sentence was "sufficient" and "long enough to get [Wren's] attention," and said in that vein that the sentence was "appropriate," she did not find that this was the lowest appropriate sentence or even the most appropriate sentence. On the contrary, her comments show the probability that she would have found a lesser sentence to be more appropriate.

The judgment should be reversed and the case remanded for resentencing. While the Circuits have adopted various approaches to deciding which sentences should be revisited because of plain *Booker* error, with the Eleventh Circuit having adopted the most stringent approach, this case would merit reconsideration under any of those approaches. Because the Judge's comments demonstrate at least a reasonable probability that she would have imposed a lower sentence had she known she had the authority to do so, this case would meet even the Eleventh Circuit's most stringent standard as set forth in *U.S. v. Rodriguez*, ___ F.3d ___, 2005 U.S. App. LEXIS 1832, *27-28 (11th Cir. 2005) (court will find reversible plain error under *Booker* only if, *inter alia*, defendant shows "a reasonable probability of a different result if the guidelines had been applied in an advisory instead of binding fashion").

2. The question of the validity of the appointment of Hon. William Pryor is presently pending before this Court in *Evans v. Stephens* (04-828), *Miller v. U.S.* (04-38), and *Franklin v. U.S.* (04-5858). This case presents the same

question. The decision below should be vacated, if the Court grants review in one or more of those cases and holds the appointment to have been invalid.

CONCLUSION

Wren respectfully requests that the decision below be vacated and that the case be remanded for further consideration and resentencing in light of *Booker*. He further requests that if the Court grants review in one or more of the other cases raising the same issue as to the composition of the panel, this case be disposed of pursuant to the holding in such case.

Respectfully submitted,

J. STEPHEN SALTER
100 Age Herald Bldg.
2017 Fifth Ave. North
Birmingham, AL 35203
(205) 252-9751

SAM HELDMAN *
GARDNER MIDDLEBROOKS
2805 31st St. NW
Washington, DC 20008
(202) 965-8884

* Counsel of Record

APPENDIX A

[DO NOT PUBLISH]

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

[Filed December 16, 2004]

No. 03-13876
Non-Argument Calendar

D.C. Docket No. 02-00588-CR-J-NE

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

versus

JERRY WAYNE WREN,
Defendant-Appellant.

Appeal from the United States District Court
for the Northern District of Alabama

December 16, 2004

Before ANDERSON, HULL and PRYOR, *Circuit Judges.*

PER CURIAM:

Jerry Wayne Wren appeals his conviction for attempted possession of marijuana with the intent to distribute, in violation of 21 U.S.C. section 846. Because the evidence was sufficient to prove that Wren attempted to possess 100 kilograms or more of marijuana, and the trial court did not plainly err in refusing to give a jury instruction Wren had requested, we affirm his conviction.

I. BACKGROUND

In 2001, Wren asked Tommy Long, a government informant, if Long could arrange for Wren to purchase marijuana. Wren and Long traveled to Texas to meet Long's associates, and Wren discussed a possible marijuana deal with them. A phone conversation between Long and Wren was recorded the day before the planned purchase, and Long testified that taped statements in which Wren referred to 300 years of fabric were code for 300 pounds of marijuana.

Police supplied a rental truck containing 88.37 kilograms of marijuana, and a police officer posed undercover as the courier. Wren met Long and the undercover officer in a motel room, gave the officer a sack containing $22,500 for the "transportation fee," and showed him another sack containing $60,000 for the marijuana. Wren inspected a sample of the marijuana, then asked to see the remainder of the drugs before finalizing the purchase. The undercover officer gave him the key to open the back of the rental truck. Wren took the key and his $60,000, refused to take the marijuana sample or the truck ignition key with him, left his car keys with the undercover officer, and left the room. Wren was arrested as he walked from the motel room to the truck. Police found plastic bags, triple beam scales, another bag containing $30,000, and a pistol inside of Wren's vehicle.

At the close of the evidence, Wren submitted two written proposed jury instructions. The "Theory of Defense" instruction stated that Wren was enticed by Long and never reached an agreement on the sale. This instruction also summarized the evidence and argued that Wren's actions in inspecting the sample of marijuana did not constitute a substantial step towards committing the crime. The "Inspection v. Possession" charge stated that the "government must show that the Defendant was preparing to leave with the marijuana, or the Government must show that the sale of

marijuana was complete at the time of the arrest." The District Court refused to give either charge.

Wren stated that he had no objections to the jury charge as proposed, but that he objected "to the failure of the Court to give the requested charges." The district court overruled this objection and gave the following instruction to the jury:

> A person who is not in actual possession but who has both the power and the intention to later take control over something either alone or together with someone else is in constructive possession of it. If one person alone has possession of something, that possession is sole. If two or more persons share possession, such possession is joint. Whenever the word "possession" has been used in these instructions, it includes constructive as well as actual possession and also joint as well as sole possession.

Neither Wren nor the government raised any specific objections to the jury instructions.

The jury found Wren guilty of attempted possession of marijuana with intent to distribute, and found that the amount of marijuana involved was 100 kilograms or more. The district court sentenced Wren to 63 months' imprisonment. This appeal followed.

II. STANDARD OF REVIEW

We review the sufficiency of the evidence *de novo*, and resolve "all reasonable inferences and credibility evaluations in favor of the jury's verdict. *United States v. McCarrick*, 294 F.3d 1286, 1289-90 (11th Cir. 2002). Because Wren did not properly preserve his objection to the jury instructions, we review for plain error the refusal by the district court to adopt his proposed instructions. *United States v. Starke*, 62 F.3d 1374, 1381 (11th Cir. 1995).

III. DISCUSSION

Wren raises three issues on appeal. First, he argues that the government offered insufficient evidence to prove that he attempted to possess the marijuana. Second, he asserts that the government offered insufficient evidence to prove that the amount of marijuana he attempted to possess was 100 kilograms or more, because the amount of marijuana actually involved in the transaction was only 88.37 kilograms. Finally, Wren contends that the trial court erred in refusing to give the jury instructions he requested regarding his theory of the case. We address Wren's first two arguments together, and then consider the third.

A. Sufficiency of the Evidence

Wren argues that the evidence was insufficient to prove that he had formed the fixed intent to possess marijuana necessary for a conviction. He also argues that the presence of only 88.37 kilograms of marijuana in the truck precluded the government from proving an attempt to possess 100 kilograms or more. Both arguments fail.

To convict for attempt, the government must prove two elements: "(1) the defendant was acting with the kind of culpability otherwise required for the commission of the crime for which he is charged with attempting; and (2) the defendant was engaged in conduct that constitutes a substantial step toward the commission of the crime." *United States v. Carothers*, 121 F.3d 659, 661 (11th Cir. 1997). "To find that a substantial step was taken, the court must determine that the defendant's objective acts mark the defendant's conduct as criminal so that the defendant's acts as a whole strongly corroborate the required culpability." *United States v. Forbrich*, 758 F.2d 555, 557 (11th Cir. 1985).

The evidence that Wren sought to possess marijuana was overwhelming. He traveled to Texas to meet Long's marijuana contacts. He negotiated the purchase of over 100

kilograms of marijuana, traveled to a motel to meet the courier, brought the necessary amount of money to pay for the drugs, and inspected a sample of the marijuana. In his car he had plastic bags and a scale, which indicated that Wren intended to repackage the marijuana into smaller quantities for resale. Wren's objective acts unquestionably constituted a substantial step towards possessing marijuana.

Wren's alleged hesitancy to purchase the marijuana until he had verified its quantity and quality was consistent with the criminal enterprise—the purchase of more than 100 kilograms of marijuana. That the government actually supplied less marijuana than Wren had agreed to purchase did not change his underlying criminal purpose. *See United States v. McDowell*, 714 F.2d 106, 107 (11th Cir. 1983) (denying rehearing *en banc*). Throughout the criminal enterprise, Wren's acts consistently showed his intent to purchase over 100 kilograms of cocaine, and the evidence presented by the government was sufficient to prove that Wren attempted to purchase over 100 kilograms of marijuana.

B. Proposed Jury Instructions

Wren argues that the district court abused its discretion by not giving the jury two of Wren's requested jury instructions. Although Wren objected to the refusal of the district court to give his proposed instructions, he did not preserve this objection by stating specific grounds for objecting. "[T]o preserve an objection to jury instructions for appellate review, a party must object before the jury retires, stating distinctly the specific grounds for the objection. Because a specific objection on this issue was not made at trial, we will only review for plain error." *Starke*, 62 F.3d at 1381. "[A] defendant is not automatically entitled to a theory of the defense instruction if that argument is adequately covered in another instruction, if it would be confusing, if it is not a legally cognizable defense, or if it merely emphasizes a certain phase of the evidence." *United States v. Blanton*, 793

F.2d 1553, 1560 (11th Cir. 1986). We will not reverse unless the decision of the district court was "so clearly erroneous as to result in likelihood of a grave miscarriage of justice, or the error seriously affects the fairness, integrity, or public reputation of judicial proceedings." *Starke*, 62 F.3d at 1381.

Wren's first instruction would fail even if he had preserved his objection. The government argues that Wren's "Inspection v. Possession" charge contained an incorrect statement of the law: "the government must show that the Defendant was preparing to leave with the marijuana or . . . that the sale of marijuana was complete at the time of arrest." If this instruction was intended to define the elements of the offense, it was legal error. If this instruction was instead intended to define possession, as Wren argues, it was unnecessary because the district court defined possession in its charge. *Blanton*, 793 F.2d at 1560.

In addition, the refusal of the district court to adopt Wren's second proposed jury instruction was not plain error. Wren argues that the second proposed instruction was intended to show that, because Long enticed Wren to purchase marijuana, Wren did not have the requisite intent for the crime. The overwhelming evidence that Wren intended to purchase over 100 kilograms of marijuana, however, could not be overcome by such an instruction even if it were proper. The district court did not plainly err in refusing to give Wren's two proposed jury instructions.

IV. CONCLUSION

The government presented sufficient evidence to convict Wren of attempting to possess over 100 kilograms of marijuana, and the district court did not plainly err by refusing to give Wren's proposed jury instructions. The judgment of the district court is, therefore,

AFFIRMED.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ALABAMA
SOUTHERN DIVISION

Case No. CR-02-J-588-NE
Birmingham, Alabama

UNITED STATES OF AMERICA,

v.

JERRY WAYNE WREN.

July 25, 2003

TRANSCRIPT OF SENTENCING HEARING
BEFORE THE HONORABLE INGE P. JOHNSON,
UNITED STATES DISTRICT JUDGE

THE COURT: There being no objections, the Court adopts the factual statements contained in the presentence report with specific findings that the offense level is twenty-six, the criminal history category is one, the guideline imprisonment range is from sixty-three months to seventy-eight months, and the supervised release period is four years to five years, and the fine range is from twelve thousand five hundred dollars to two million dollars, and restitution is not an issue.

. . .

THE COURT: All right, is there anything from you, Mr. Felton?

MR. FELTON: No, Your Honor, just that the government requests a mid-range in the guidelines.

. . .

THE COURT: . . . The Court finds no reason to depart from the sentence called for by application of the guidelines inasmuch as the facts as they are found are the kind contemplated by the sentencing commission.

Pursuant to the Sentencing Reform Act of 1984, it's the judgment of the Court that the defendant, Jerry Wayne Wren, is hereby committed to the custody of the Bureau of Prisons to be imprisoned for a term of sixty-three months, which is the lowest I can give you. But under the circumstances, I think that is sufficient punishment and appropriate under the circumstances. You are not a man who has been involved in a crime, as far as I can tell from your criminal history record, and I think this is certainly long enough to get your attention. Under the guidelines, I have no discretion as far as above or below under the facts of this particular case.

. . .